*The Hon'ble Sri Justice V.V.S.RAO

+Writ Petition No.20432 of 2005

%17.11.2005

£M/s.Nandhini Delux, 114/2, Lalbagh Fort Road,

Bangalore

…Petitioner

Vs.

$The Government of Andhra Pradesh,

Represented by its Principal Secretary (Political)

General Administration, Secretariat,

Hydeabad

… Respondent

!For the petitioner …Mr. D.Srinivas

^For the Respondents No.1 …The Advocate General

For the Respondent No.2 …O. Manohar Reddy

<Gist:

>Head Notes:

? Cases Referred

1. (1979) 3 SCC 489
2. (1993) 1 SCC 445
3. (1980) 4 SCC 1 = AIR 1980 1992
4. 2005 (5) ALT 325
5. (1994) 6 SCC 651
6. (2000) 2 SCC 617 = AIR 2000 SC 801
7. 2004 (1) ALD 783 = 2004 (5) ALT 599
8. AIR 1979 SC 1628
9. (1990) 2 SCC 488
10. (1991) 3 SCC 273 = AIR 1991 SC 1579
11. (2001) 2 SCC 451 = AIR 2001 SC 682
12. 2005 AIR SCW 2875

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.20432 OF 2005

DATED 17.11.2005

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BETWEEN

M/s.Nandhini Delux

114/2, Lalbagh Fort Road,

Bangalore (a registered firm)

… Petitioner

and

The Government of Andhra Pradesh,

Rep. by its Principal Secretary (Political),

General Administration, Secretariat,

Hyderabad.

… Respondent

THE HON'BLE SRI JUSTICE V.V.S.RAO

-

WRIT PETITION NO.20432 OF 2005

ORDER:

This writ petition is filed praying for a writ of Mandamus declaring the action of the first respondent in disqualifying the petitioner in the technical bid for leasing out restaurant, canteen and pantry at A.P.Bhavan, New Delhi, as illegal, arbitrary and violative of Article 14 of the Constitution of India. At the stage of admission itself, the first respondent, namely, Government of Andhra Pradesh, and second respondent (who was impleaded later) filed counter affidavits. The learned counsel appearing for rival parties made detailed submissions and therefore with their consent the matter is being disposed of by this order. The petitioner also seeks a consequential direction to the first respondent to accept the technical bid of the petitioner and consider price bid. Alternatively, it is also prayed to cancel the tender process pursuant to tender notice dated 03.08.2005.

The case of the petitioner as disclosed in the writ affidavit, in brief, is as follows. The first respondent issued tender notice dated 03.08.2005 inviting tenders from reputed catering contractors for running restaurant/canteen and pantry for the inmates of Guest House and visitors of A.P.Bhavan. The petitioner has all essential and subsidiary qualifications prescribed in the tender notice. As required by tender notice, he submitted the technical bid and financial bid. Technical bids were to be opened on 31.08.2005. However, they were not opened on that day. On being telephonically informed, the representative of the petitioner attended the first respondent's office on 05.09.205 at 5.00 p.m. He was orally informed that the petitioner was not qualified in the technical bid. On further enquiry, the petitioner learnt that the first respondent while evaluating technical bids took into consideration various conditions, which were not part of tender notice. The petitioner is a firm, which was started in 1989 with a single unit. It established a chain of hotels under the name and style of "Nandhini Delux" specializing in catering high-class vegetarian and non-vegetarian authentic Andhra style foodstuffs with high quality. It has earned good reputation for its group of hotels, which employs 700 persons and has a combined turnover of Rs.12.50 crores. The petitioner also established lodging houses in Bangalore and maintaining high standards of quality and competitive prices. It is also involved in out-door catering to software companies. The petitioner has three partners, namely, M/s.Narasimhaiah, N.Ananda and Rupesh Anand, who are also partners in other firms running entire group of hotels. The petitioner firm is having a minimum turnover of Rs.2.50 crores during the last financial year. The petitioner is also having strong quality control mechanism for foodstuffs and has offered more competitive price bid. The first respondent considered irrelevant conditionalities and evaluated price bids applying hidden criteria, which is arbitrary and violative of Article 14 of the Constitution of India. It is also alleged that the first respondent has fixed additional criteria to suit the needs of some tenderers.

The Additional Secretary to Government in General Administration Department filed counter affidavit denying various petition averments/allegations. It is stated as follows. When the existing catering contract of M/s.Sai Caterers was to expire on 02.08.2005, Government have taken a decision to call fresh tenders for awarding the contract. In order to professionalise and upgrade catering service, it has been decided to make policy changes in view of the importance of professionalised catering services at A.P.Bhavan in New Delhi. In pursuance of the tender notice, eight parties submitted the bids before due date. After receipt of these, the Committee appointed for evaluating the tenders evolved a transparent and foolproof system of evaluation. The Committee decided to allot marks for different parameters under different heads prescribing fifty per cent as cut-off marks. The parameters and the marks prescribed each one are as follows.

ITEM	Condition referred to in the tender notice	Maximum marks allotted under this head
Mandatory		
Whether the tenderer is incorporated/ registered for F&B business	Special Condition 3	

Turnover in the last financial year (Min Reqd. 2.5 cr)	Special Condition 4	10*
Income Tax & Sales Tax/VAT certificates enclosed	Para 2.2(i)	
OTHER QUALIFYING CONDITIONS		
Existing outlets in India/branches	Para 2.2(ii)	5
Experience in preparing Veg & Non-veg Andhra dishes	Special Condition 5	10
Experience in managing/running Guest Houses/State Canteens	Special Condition 9	10
Experience in dealing with reputed corporates	Special Condition 9	10
Experience in dealing with high dignitaries & officials & non-officials of Govt	Para 2.2(iii)	15
Quality Control Mechanism & systems adopted	Special Condition 6	15
Certification from ISO/HACCP/other Agency	Special Condition 6	15
Experience in catering services at Delhi	Para 2.2(ii)	10
TOTAL MARKS		100

The Committee also decided to allot marks only in respect of qualifications of the tenderers which have bearing on the quality of service to be provided. Conditionalities like registration/ incorporation and submission of tax documents have not been given any weightage in the marks though they were verified. The criteria evolved was uniformly applied to all tenderers. On 05.09.2005, the administration has explained to the tenderers the procedure adopted for allotting marks and they were given opportunity to peruse the performance under each head. The Committee was extremely liberal in awarding marks to the tenderers but in the absence of proper documentary evidence, it was not possible to allot marks in some cases. The Committee adopted such modalities in awarding marks bifurcating the criteria in an even manner without giving any party any undue advantage.

The petitioner submitted tax documents of turnover of Rs.2,48,98,584/- and a certificate issued by Chartered Accountant showing a turnover of Rs.2,51,73,151/-. Though the prescribed eligibility requires a turnover of Rs.2.5 crores, the Committee gave benefit of doubt to the petitioner and did not disqualify him on the said ground. The petitioner submitted partnership deed, certificate from Chartered Accountant, tax challan, write up on the profile and food licence. In these documents, there is no mention of quality control mechanism adopted and experience in running State Guest Houses/Canteens/State Bhavans like A.P.Bhavan, Kerala Bhavan, Punjab Bhavan, Himachal Bhavan, Tamil Nadu House and Maharashtra Sadan etc., in New Delhi. Therefore, he could not be awarded any marks under these heads though the petitioner was awarded maximum marks under the head “existing outlets/branches” and “experience in preparation of veg/non-veg Andhra dishes”. The petitioner was awarded 33 marks out of 100, which is below the qualifying mark. Out of eight tender documents received, only three tenderers qualified in technical bid. The Committee after careful scrutiny of the terms and conditions of tender schedule and also keeping in view the importance of having professional and good catering service in A.P.Bhavan, New Delhi, adopted modalities of awarding marks under different headings giving due weightage to previous experience, quality certification etc. A

person having previous business experience in Delhi would find it easy to manage the canteen at A.P.Bhavan and therefore weightage for experience in Delhi was given allotting ten marks. The Committee has evaluated the tenders with reference to conditions in the schedule and no additional conditions were stipulated or adopted subsequent to publication of tender notice.

While the matter was under consideration at the preliminary stage, M/s.D.R.Hotels (Nellore) Private Limited, represented by its Managing Director Sri K.Deepak Ram Reddy, filed miscellaneous petition being W.P.M.P.No.26783 of 2005 for impleading in the writ petition. According to the said company, it has submitted the valid technical bid and submitted most responsive financial bid, which was recommended by the Committee and therefore, it is a proper and necessary party. This Court impleaded the said company as second respondent, which has also filed an affidavit along with application for impleadment. In a nutshell, its averments may be noticed. The second respondent is running three-star hotel with sufficient experience in catering. It was selected as best three-star hotel in the region by A.P.Tourism Department for the year 2004. In pursuance of the tender notice, it submitted its tender in two parts. The decision on technical bid was revealed on 05.09.2005 by announcing the marks awarded for each of the criteria mentioned in special conditions of tender notice under tender schedule. The representative of the writ petitioner cross-checked the marks awarded to it and the marks awarded to successful tenderer. The Committee followed a fair method in awarding marks and rejected the tender of the petitioner. The special conditions in the tender schedule were taken into consideration and there were no hidden criteria. Though the second respondent was placed at serial No.1, the contract could not be awarded in view of the orders passed by this Court.

Learned counsel for the petitioner, Sri D.Srinivas, submits that as per conditions in tender schedule the eligibility criteria of contractor will have to be examined with reference to the documents mentioned in para 2.2. However, the first respondent evaluated technical bids by taking into consideration irrelevant and undisclosed conditionalities in rejecting the technical bid of the petitioner, which is unfair, illegal and arbitrary. Secondly, with reference to the allotment of marks for various criteria, he would urge that the first respondent has improperly evaluated the technical bid with reference to quality control mechanism & systems adopted, certification from ISO/HACCP and experience in catering service in Delhi. He also points out that none of the eight bidders was having previous experience in managing guest houses/State canteens and State Bhavans, and therefore impliedly this condition was relaxed but still in an arbitrary manner the first respondent allotted marks. According to the learned counsel, such condition/criteria was contemplated as mandatory as per condition 2.2(ii) of tender schedule and therefore the whole exercise taken up by the first respondent is arbitrary, unfair and illegal. He placed strong reliance on **Ramana Dayaram Shetty v International Airport Authority** (hereafter called, **International Airports Authority** case)**, Sterling Computers Limited v M&N Publications, Kasturi Lal Lakshmi Reddy v State of Jammu & Kashmir and GVPREL–MEE (JV) v Government of A.P.**

The learned Advocate General for the first respondent would submit that there was

no hidden criteria or undisclosed eligibility criteria while evaluating the technical bids of all the tenderers. As per the tax documents submitted by the petitioner, he was not even eligible as he fell short of the required turnover of 2.5 crores. But still the committee appointed for the purpose evaluated the technical bid of the petitioner. The three criteria or conditionalities pointed out by the learned counsel for the petitioner find place in the tender notice and they cannot be treated as irrelevant in evaluation of the bids. Insofar as condition 2.2(ii) is concerned, the learned counsel would submit that except M/s.Sai Caterers, none of the tenderers was having any experience in running canteens at State Bhavans, and therefore while evaluating the technical bids of the tenderers, they were treated uniformly. According to the learned Advocate General, in the absence of any *mala fides*, the State action cannot be treated as arbitrary. The method adopted by the tender committee is transparent, fair and objective. In support of the submissions, he placed reliance on **Tata Cellular v Union of India, Air India Limited v Cochin International Airport Limited, Godavari Polymers Pvt. Ltd. v Agricultural Products Commissioner & Principal Secretary and GVPREL-MEE (JV) v Government of A.P.,** (supra).

The learned counsel for second respondent, Sri O.Manohar Reddy, while adopting submissions of learned Advocate General, would urge that all the conditions of eligibility and other criteria are uniformly applied to all the tenderers and the committee followed most transparent and objective method in evaluation of the tenders and therefore no interference is called for in this writ petition.

The only point that arises for consideration is whether the first respondent followed a fair, transparent and unarbitrary method in evaluating the technical bids of the petitioner, second respondent and others in accordance with the conditions/criteria contained in the tender schedule.

This Court has perused the relevant file and the technical bids submitted by the petitioner. This Court also perused the technical bids submitted by M/s.Sri Haripriya Hotels Private Limited, M/s.Ultimate Hospitality Services (Private) Limited, whose technical bids were found to be responsive by the tender committee before opening the financial bids and coming to the conclusion that the financial bid submitted by the second respondent is more responsive in terms of the lease amount offered.

The tender schedule is in two parts. The first part contains conditions (hereafter called, the general conditions) 1.1 to 19.0. The second part under the heading “special conditions” (hereafter called special conditions) contains 24 conditions. It is very curious that the tender notice dated 03.08.2005, which was published in the newspapers does not contain the general conditions but only the special conditions were notified. Be that as it is, as per general conditions, the bid is to be submitted in two parts: first part containing general information, technical credentials and terms and conditions; whereas part II contains financial bid. The opening of part II would arise only in respect of those parties, who qualify the technical criteria.

The term of ‘technical criteria’ is not defined but it can be inferred that the

same refers to the essential qualifications. In the tender conditions, conditions 1.1 to 1.5 and 2.4 to 19.0 contain the duties and obligations of the Government (offeror) and the contractor (offeree) as well as mutual duties and obligations of the contract in the event of employment. Conditions 2.2 to 2.3 in general conditions are very important and read as under.

> 2.2 the first cover shall contain the following **qualification data.**
>
> The caterer must quote in the technical bid.
>
> I. Maximum turnover year wise including Sales Tax as well as Income Tax paid in the last 3 years.
>
> II. Experience of running of Canteens in State Bhavans, Government establishments, etc.
>
> III. Any other documentary evidence in their support indicating his/her capability and experience to run such a Canteen.
>
> The qualification details to be furnished along with attested copies of above documents should be put in the first cover and sealed and superscripted as "Qualification data". The financial bid for the work in question and the remaining tender schedule shall be put and sealed in the second cover and superscripted as "Financial bid".
>
> 2.3 While opening the tender, the sealed cover containing the qualification data will be opened first. **Eligibility of contractor will be examined with reference to the documents mentioned part 2.2.**
>
> (emphasis supplied)

A reading of the above conditions would show that (a) a bidder must quote the maximum turnover year wise including sales tax/income tax paid in the last three years; (b) experience of running of canteens in State Bhavans/Government establishments; and (c) any other documentary evidence in support of capability and experience to run such a canteen. Condition 2.2 describes these three conditions as "qualification data". As per condition 2.1(iii) the eligibility of contractor/ qualifications will be examined with reference to the documents mentioned in para 2.2. There is no denial before this Court by the parties that the term "State Bhavans" can only mean A.P.Bhavan in New Delhi because the State Government does not run any such Bhavans anywhere in India except in New Delhi. Therefore, the first step to be taken is to see whether any bidder is having any experience in running a canteen in a Stat Bhavan (any Bhavan run by any State Government) or Government establishments that would alone determine the qualifications of the tenderer.

The special conditions are subsidiary and in some way clarify the essential/general conditions in para 2.2. For instance special condition 4 requires the Company/organization should have a minimum turnover of 2.5 crores per annum

during the last completed financial year. The other special conditions relevant for the purpose of this consideration are special conditions 5, 6, 9 and 18, which are extracted hereunder.

> 5. The party should have previous experience in preparation of Vegetarian and Non-Vegetarian Andhra Dishes.
>
> 6. The company/organization should have a strong quality control mechanism for food safety and personal hygiene with mandatory audit by an outside professional agency. It should follow Hazard Analysis Critical Control Point (HACCP) or other best management practices for food safety. **It is desirable that the Organisation has quality certification from ISO/HACCP/any other certifying agency.**
>
> *9.* **It is desirable that the Organisation has previous experience in maintaining Guest Houses and providing catering services to reputed corporates.**
>
> 18. The experience of the tenderer having dealt with Guest Houses in interface with officials, non-officials and also high dignitaries, would be given due weightage in selection. If required, the tenderer should arrange to show Cantee/Restaurant being run by him at present to the Resident Commissioner or to any other officials authorized by him or by Government of Andhra Pradesh.
>
> (emphasis supplied)

As noticed, special condition 4 read with general condition 2.2(i) speaks about the financial capability of the tenderer and therefore it forms part of "qualification data" as per general condition 2.2. General condition 2.2(ii) read with Special Condition 5 has to be treated as forming essential qualification/criteria. General condition 2.2(iii) requires a tenderer to enclose documentary evidence in the first cover (technical bid) or in support of capability and experience to run canteens in State Bhavans/Government establishments. Be it noted that general condition 2.2(iii) refers to **"experience to run such a canteen"**, which only means canteen in State Bhavan/Government establishment. Special condition No.6 is in two parts. The first part is to the effect that the company/organization should have strong quality control mechanism for food safety and personal hygiene with mandatory audit by an outside professional agency. It should also follow Hazard Analysis Critical Control Point (HACCP) or other best management practices for food safety. The second part of special condition No.6 is to the effect that "it is desirable that organization has quality certification from ISO/HACCP/any other certifying agency". Special condition No.9 also makes it clear that experience in maintaining guest houses and providing catering to reputed corporates is only desirable. It would, therefore, be reasonable to infer that certification from ISO/HACCP and experience in maintaining guest houses/ providing catering to corporates is only desirable whereas as per general condition No.2.2(ii) experience in running canteens in State Bhavans is essential and mandatory requirement to be complied by a tenderer. When any tender conditions make a qualification or eligibility criteria only "desirable" and makes other conditions like experience in running the canteens in State Bhavans as part of qualification

data or criteria, it must be interpreted that whatever is desirable is not essential. Tender conditions, it is well settled, are in the nature of administrative/executive instructions which in the context of Governments contractual powers, require need to be interpreted having regard to the language in such tender conditions.

A reference may be made to the oft quoted decision of the Supreme Court in **International Airports Authority** case (supra), it was held as under.

> It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable.

The eligibility criteria or qualification data/conditionalities may be classified into two. Those criteria which require strict compliance by every tenderer; that is to say every tenderer must strictly satisfy the essential qualifications, the non compliance of which would disentitle further consideration. Second category of criteria/conditionalities are of substantial compliance category which are required to be followed or complied with for achieving the main object of the strict compliance conditionalities. The second category conditions/criteria can be relaxed and rigid compliance is not insisted upon. If there is any indication in the tender documents i.e., tender notice and/or tender schedule and in the event of difference in the conditions, tender schedule alone, has to be interpreted in such a manner to differentiate the essential conditions requiring strict compliance and those technical conditions which need to be substantially complied. The non-compliance of which does not disqualify a tenderer.

In **Ram Gajadhar Nishad v State of Uttar Pradesh**, the tender conditions required the tenderer to submit solvency certificate to the Collector. The Supreme Court interpreted the condition as requiring strict compliance and that non-compliance with the condition would lead to non-acceptance of the tender.

In **G.J. Fernandez v State of Karnataka**, the Supreme Court considered a case where the notification inviting tenders by Karnataka Power Corporation Ltd., was in XII paras, and the question was whether the conditions in Part-I and V are mandatory. Para-I laid down pre-conditions of eligibility for submitting a tender. Para-V requires the tenderers to supply the details called for. The Supreme Court held that the pre-conditions of eligibility for submitting tender must be considered as mandatory, and that omission to supply every small detail referred to in Para-V will not affect the eligibility under Para-I and disqualify the tenderer. It was also indicated that the various conditions should be considered in a harmonious and practical manner. Be it noted that Para-I laid down the pre-conditions of eligibility and Para-V

required supplying of details for assessing the fulfilment of conditions in Para-I. The Supreme Court referred to the ratio in **International Airports Authority** case (supra) in support of the view that all conditions of tender cannot be interpreted as requiring strict compliance. The following observations are apt and may be extracted.

> …..It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in **Ramana case** will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the applicant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits.

G.J. Fernandez v State of Karnataka (supra) is an authority for the proposition that pre-conditions of eligibility cannot be deviated from and strict compliance test should be applied, whereas the conditions requiring formalities in relation to the pre-conditions can be deviated from without causing prejudice to the rival competitors as they require a substantial compliance only. **G.J. Fernandez v State of Karnataka** (supra) was followed in **Poddar Steel Corporation v Ganesh Engineering Works**, and it was held thus:

> **… As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases…**
>
> (emphasis supplied)

In **West Bengal Electricity Board v. Patel Engineering Corporation**, the respondent requested permission to correct a 'repetitive systematic computer typographical transmission error' in their tender submitted by it pursuant to the tender notification issued by the West Bengal Electricity Board. The appellant evaluated the bid and pointed out a number of arithmetical errors. Challenging the

same, a writ petition was filed in the High Court at Calcutta. A learned single Judge of the High Court directed the West Bengal Electricity Board to reconsider the representation of the respondent and pass a reasoned order. A Division Bench of the High Court in writ appeal agreed with the learned single Judge and further directed the West Bengal Electricity Board to correct the errors in the tender documents. In appeal by the West Bengal Electricity Board, the Supreme Court reversed the judgment of the High Court at Calcutta holding that the instructions to bidders have to be strictly complied with, and there can be no departure therefrom. It is apposite to quote the following:

> … The degree of the care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant-respondent Nos. 1 to 4 and respondent Nos. 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our constitutional values. **The very purpose of issuing rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.**
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> (emphasis supplied)

In **Global Energy Limited v Adani Exports Limited**, the appellant who is having category 'A' licence challenged the tender condition prescribed by West Bengal State Electricity Board requiring the deposit of Ernest Money Deposit (EMD) of Rs.30 lakhs in the form of demand draft. A learned single Judge of Calcutta High Court at interlocutory stage granted liberty to the appellant to participate in the tender process by furnishing bank guarantee or bankers cheque. The said order was set aside by Division Bench. Before the Supreme Court, it was contended that the condition of deposit of EMD is arbitrary and illegal. It came to light that the appellant did not have the requisite category of licence i.e., category of licence for trading power. This condition was treated as essential condition and the Supreme Court held as under.

> The fact that M/s.Global Energy Limited has a licence of category 'A' and that the said licence is subsisting in its favour on the basis of an interim order passed by the High Court is not in dispute. Under the regulations of

> Central Electricity Regulatory Commission, a holder of category 'F' licence is entitled to trade in over 1000 million units of power in a year. The total power intended to be traded by the electricity Board is 1471 million units for which appellant No.1 does not possess the requisite licence. **Having regard to these facts, we are clearly of the opinion that no ground has been made out by the appellants, which may warrant interference by this Court with the decision taken by the west Bengal State Electricity Board in not awarding the contract to the appellant No.1 as price offered cannot be the sole criteria in the matter of trading of power where holding of relevant licence is mandatory under the Regulations of Central Electricity Regulatory Commission.**
>
> (emphasis supplied)

Applying the principles in **G.J. Fernandez v State of Karnataka** (supra) and **Poddar Steel Corporation v Ganesh Engineering Works** (supra), this Court holds that the "qualification data" as mentioned in general condition No.2.2 read with special condition Nos.4, 5 and first part of special condition No.6, which deal with preconditions of eligibility require strict compliance by every tenderer and the tender authority cannot deviate from those conditions (See paras 6, 7 and 10 of **International Airports Authority** case). Indeed, general condition 2.3 itself requires the eligibility of contractor to be evaluated with reference to the documents referred to in general condition 2.2. All other conditions including the second part of special condition 6 and special condition 9 and 18 are only subsidiary to conditions of eligibility, which should receive less weightage at the stage of evaluation of bids. If, for any reason, any of the tenderers or none of the tenderers fail to satisfy any of the preconditions of eligibility as mentioned in general condition No.2.2 including the experience of running a canteen in a State Bhavan, the first respondent can either reject all the tenders calling for fresh tenders or consider only such of the tenderers, who satisfy the preconditions of eligibility which are as held in **G.J. Fernandez** by the apex Court are of mandatory nature. Any deviation of this principle and any deviation from the tender conditions especially preconditions of eligibility would render the whole tender process illegal and unconstitutional.

The relevant file would show that one R.Satyanarayana representing M/s.Sai Caterers made a representation to the Hon'ble Chief Minister stating that they have been running a restaurant in A.P.Bhavan since 1986, that the lease is expiring and requested for further extension of five years. Principal Secretary to Chief Minister sent a note to Principal Secretary in General Administration Department (Political) to examine the said representation and take necessary action. The Government then called for remarks of Resident Commissioner, New Delhi, who addressed a letter dated 04.06.2005 to the Principal Secretary to Government in General Administration Department. Impliedly declining any extension to the present contractor, the Resident Commissioner suggested to call for fresh tenders and also enclosed draft tender notice. The section concerned then put up a note detailing the tender conditions to be incorporated in the tender schedule/tender notice. When the same was circulated to Hon'ble Chief Minister, it was approved on 26.07.2005. The note file at page 8 (para 18.4) contains a condition that a tenderer should have at least ten years experience of having run similar establishments and should have experience in the preparation of Andhra food dishes. Based on the said 'Note For

Circulation' at pages 7 to 10 of the note file, the tender schedule and tender conditions were prepared and ordered to be published in four newspapers including regional language newspaper published in Hyderabad and three newspapers in New Delhi. By reason of which, the tender notice was published in the newspapers showing only special conditions. A reading of the note approved by the Hon'ble Chief Minister would also suggest that experience in running a canteen in a State Bhavan was considered to be a mandatory precondition of eligibility, which cannot be deviated from, by anybody.

I n **International Airports Authority** (supra), the contract for running a II class restaurant in International Airport at Bombay was awarded to fourth respondent therein. Before the Supreme Court, it was contended that fourth respondent did not satisfy the condition of eligibility of having five years experience as II class hotelier. It was also contended that the authority was not entitled to depart from the conditions of eligibility in evaluation of the standard or norm of eligibility. The Supreme Court accepted the contention and observed that the test of eligibility laid down was an objective test and not subjective one and that if a person submitting tender did not have at least five years experience of running a II class hotel, he was not eligible to submit the tender and it would not enable him to say that though he did not satisfy the said condition he was otherwise capable of running a II class restaurant. The Court found that fourth respondent was having experience only in catering line and that the condition of eligibility was not satisfied in his case. Ultimately, the Supreme Court while observing that the first respondent was bound to conform to standard or norm laid down in the notice inviting tenders without departing from the standard. It was held:

> If there was no acceptable tender from a person who satisfied the condition of eligibility, respondent 1 could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of respondents 4. **When respondent 1 entertained the tender of respondents 4 even though they did not have 5 years' experience of running a II Class restaurant or hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract.** There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a II Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with respondents 4 for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. **The action of respondent 1 in accepting the tender of respondent 4, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of respondent 4 was, in the circumstances, invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action.**
>
> (emphasis supplied)

The learned counsel for the petitioner and the learned Advocate General for the State made detailed submissions with regard to the method adopted by the tender committee in considering certain norms/standards as mandatory and others as other qualifying conditions. The statement prepared by the tender committee allocating marks to different conditionalities and awarding marks to each of the eight tenderers under these conditionalities (referred in the statement as items) is annexed to the writ petition and is also found in the file.

Before dealing with this aspect of the matter, we need to refer to two decisions of the Supreme Court. I n **Kasturi Lal Lakshmi Reddy** (supra), the principle in **International Airports Authority** case (supra) was further explained in paras 11 and 12 of SCC. The observations at para 11 are as under.

> So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largesse. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner, it has to be exercised for the public good. Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

Yet again in para 15, it was held:

> The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D. Shetty v. International Airport Authority of India, (AIR 1979 SC 1628) (supra) that the Government is not free, like an ordinary individual, in selecting the recipients for its largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meet the test of reason and relevance. This rule was enunciated by the

> Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Article 14.

Any Government action in awarding contracts or giving largess, is therefore to be tested in the light of the two limitations pointed out by the Supreme Court in **Kasturi Lal Lakshmi Reddy** (supra).

In **Sterling Computers Limited** (supra), the supreme Court pointed out that even though executive must have some "play in the joints", while taking decisions in respect of commercial transactions, a public authority must be guided by relevant considerations which it ought to take into account and if it is established that such a decision is influenced by extraneous consideration which ought not to have been taken into consideration, it would breach the legal limits and such authorities. It was also held that doctrine of executive necessity cannot be a defense for the Government when the norms and procedures prescribed by the Government are not strictly followed.

In **Cochin International Airport** (supra), on which strong reliance is placed by the learned Advocate General, the principle was reiterated. After referring to **International Airports Authority** case (supra), **Tata Cellular** (supra) and other decisions, the apex Court summarised the ratio as under. (para 7 of SCC)

> **The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned.** Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.
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> (emphasis supplied)

The above decision also reaffirms the settled principle in the field of Government contractual powers that the State is bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. If the

Government indicates preconditions of eligibility and evaluates the technical bids ignoring such norms and standards, the entire decision making process must suffer the wrath of Article 14. Secondly, even by evaluating the technical bids in accordance with the norms and standards, if the authority fails to understand the difference between the essential "conditionalities" and desirable and/or preferred qualifications or subsidiary qualifications in allocating marks to such parameters, the same would be arbitrary. Thirdly, if at the stage of evaluation the tender authority introduces extraneous element and also considers such a thing while adopting the method of allocating and awarding marks to various tenderers, the same would be capricious, irrational and can be branded as vitiated by legal malice. This Court in **GVPREL-MEE (JV)** (supra), noticed this principle.

The submission of the learned counsel for the petitioner may now be considered in the light of the law declared by the Supreme Court. The learned counsel submits that the first respondent took into consideration irrelevant and undisclosed conditionalities and there was improper evaluation of the technical bids in allocating and allotting marks by the tender committee totally ignoring general conditions 2.2 and 2.3. Though the learned Advocate General for the first respondent strenuously refutes this, having regard to the principle laid down in **International Airport Authority** (supra), which received the approval in almost all subsequent Supreme Court decisions, there is force in the submission made by the learned counsel for the petitioner in certain aspects. In a petition for judicial review, the Court cannot sit in appeal over the decision of the public authority and the Court is interested only to see that all the persons subjected to burdens and benefits received equal and fair treatment in a manner, which is not capricious and arbitrary. Whether the first respondent or tender committee has addressed the proper questions while undertaking the evaluation of the technical bids? Whether the allocation of marks by the tender committee is rational and unarbitrary? These are questions essentially concerned with the decision making process and not the decision itself. While reviewing such process, it would be necessary for the Court to subject various general conditions and special conditions to an analysis to arrive at a reasonable conclusion as to the intention of the first respondent in issuing such a tender notice. It is also necessary for the Court to see whether the tender committee has correctly appreciated the purport of each of the conditionalities whether they are general or special.

As noticed above, the qualification data or eligibility criteria found in general condition 2.2(i) read with special condition 4 (turnover criteria) and general condition 2.2(ii) read with special condition 5 (experience criteria) are two preconditions of eligibility, which need strict compliance by all the tenderers. Tender authority is therefore required first to decide as to who are the persons who satisfy the essential mandatory conditions that is turnover criteria and experience criteria and then only take up the evaluation of bids with reference to other parameters. In this case, it was not done. Though the tender committee treated turnover criteria as one of the three mandatory conditions, the experience criteria was treated as "other qualifying conditions". This itself amounts to misdirection in law. It is not denied before this

Court that out of eight tenders received only one of the tenderers satisfies precondition of eligibility in general condition 2.2(ii) i.e., the experience in running canteens in State Bhavans/Government establishments. The whole exercise, therefore, suffers from this incurable defect in the decision making process. It is no doubt that the petitioner itself does not satisfy this condition but the petitioner, the second respondent and others were given relaxation of this condition and also with regard to special condition 9, which is only "desirable" criteria. The notification published in newspapers never indicated that the Government would grant relaxation of general conditions and special conditions. If only such condition was notified, there would have been better persons/organizations with better qualifications who might have tendered for the contract. In **International Airports Authority** (supra), the Supreme Court considered such aspect of the matter and though did not grant any relief to the appellant and did not invalidate the contract awarded fourth respondent therein, nevertheless found fault with the procedure adopted by the tender authority. For the same reasons, this Court is not able to approve the method adopted by the first respondent or tender committee in granting relaxation of precondition of eligibility which has to be satisfied by all the tenderers.

The committee, which evaluated the tenders, identified "eight other qualifying conditions" besides three mandatory criteria. Curiously, while allotting marks, the mandatory criteria as discussed above were allotted low weightage and for other qualifying conditions, which were described in the tender notice as "desirable" or "preferred" qualifications were given more weightage. This is certainly irrational. It is accepted position in law that when essential qualifications are prescribed and incidentally it is specified that a given additional qualification or criteria is 'desirable' or persons with such specified additional criteria or qualifications would be 'preferred' to others, it only means that in the event of two persons achieving a similar bench mark or above bench mark, the persons with specified additional qualifications or criteria would be selected subject to other conditions of compliance. In the method adopted by the tender evaluation committee, however, this principle was ignored and therefore this is also one area where the decision making process suffers from incurable defect.

In the result, for the above reasons, this writ petition is disposed of in the following manner.

i) It is declared that the petitioner and the second respondent are not qualified in accordance with the tender conditions as they do not satisfy the essential eligibility criteria as per general condition 2.2(i);

ii) the tender conditions do not enable relaxation of the essential eligibility criteria, and unless and until such possibility of relaxation is notified in the tender notice itself, if such relaxation is given, the same would amount to violating the principle of fairness and transparency in the administration violating Article 14 of the Constitution of India;

iii) the first respondent is directed to reconsider all the remaining tenders keeping in view the observations made hereinabove, and in case none of the tenderers

satisfies the essential eligibility criteria as per general condition 2.2(i), issue fresh notice inviting tenders; and

iv) there shall be no order as to costs.

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(V.V.S.RAO,J)

.11.2005.

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